INDEX

CITATIONS

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 77

HAROLD A. BOIRE, REGIONAL DIRECTOR, TWELFTH REGION, NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE GREYHOUND CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (R. 71) is reported at 309 F. 2d 397. The decision of the district court (R. 52–59) is reported at 205 F. Supp. 686. The Board's Decision and Direction of Election (R. 67–69) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1962 (R. 72). The petition for a writ of certiorari was filed on February 18, 1963, and

was granted on April 15, 1963 (R. 73; 372 U.S. 964). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth in the Appendix, *infra*, pp. 33–38.

QUESTION PRESENTED

Whether a district court has jurisdiction, at the suit of an employer, to enjoin a representation election directed by the National Labor Relations Board.

STATEMENT

In April 1961, the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL–CIO ("the Union") filed a petition with the National Labor Relations Board, pursuant to Section 9(c) of the National Labor Relations Act, requesting a representation election among the porters, janitors and maids working at four bus terminals in Florida operated by the Greyhound Corporation (R. 65).[1] The employees whom the Union sought to represent were on the payroll of Floors, Inc., of Florida, a corporation engaged in the business of providing cleaning, maintenance and similar services in

[1] The original petition applied only to the porters and maids (R. 65). The petition was amended at the Board hearing to include janitors (R. 67).

Florida to various customers like Greyhound (R. 68, 42–43). Floors was under contract with Greyhound to provide services at Greyhound's terminals in Miami, St. Petersburg, Tampa and Jacksonville (R. 16–34).[1] The Union's amended petition designated both Greyhound and Floors as the "Employer" of the service employees and requested a single bargaining unit comprised of the employees at the four terminals (R. 66).

At the Board hearing on the Union's petition, the Union contended that Greyhound was a joint employer of the employees and that the unit requested was therefore appropriate as a residual unit of all unrepresented Greyhound employees at the four terminals. Alternatively, the Union contended that the requested unit was appropriate because the employees concerned comprised a homogeneous, distinct group. Greyhound and Floors contended that Floors was the sole employer of the employees and Floors contended that the bargaining unit should not be restricted to its employees working at Greyhound terminals but should consist either of all Floors' employees in Miami, St. Petersburg, Tampa and Jacksonville or of three separate units of all Floors' employees in (1) Tampa-St. Petersburg, (2) Miami, and (3) Jacksonville (R. 68).

[1] The record shows that in the Jacksonville terminal the porters, janitors and maids were employed directly by Greyhound prior to 1954. The Union represented these employees under a collective bargaining agreement entered into with Greyhound in 1953. When Greyhound contracted with Floors on November 11, 1954, the Union lost its representation of the service employees at the Jacksonville terminal (R. 37–40). The record does not show the history at the other three terminals.

On May 3, 1962, the Board issued a Decision and Direction of Election finding Greyhound and Floors to be joint employers of the porters, janitors and maids and holding that a unit consisting of the jointly employed workers was an appropriate unit in which to hold an election (R. 68).[3] The Board directed an election among the employees in this unit to determine whether or not they desired to be represented by the Union (R. 69). Floors' motion for reconsideration was denied (R. 70). The election was tentatively scheduled for May 28 or 29, 1962 (R. 15). As a consequence of the present action, the election has not been held.

On May 23, 1962, Greyhound filed suit against the Regional Director of the Board in the United States District Court for the Southern District of Florida, seeking an injunction restraining the Regional Director from conducting an election pursuant to the Board's Decision and Direction of Election of May 3, 1962, and further seeking an order striking down and setting aside the Decision and Direction of Election. Greyhound contended in its

[3] The Board found that there was "common control" over the employees involved. The Board found that, while Floors hires, pays, disciplines, transfers, promotes and discharges the employees, Greyhound participates in setting up work schedules and in determining the number of employees needed to meet the schedules. Moreover, the Board found that Floors' supervisors visit the terminals only irregularly, that the employees receive work instructions from Greyhound officials, and that Greyhound on one occasion caused the discharge of an employee it considered unsatisfactory. Member Rodgers dissented, believing that the employees were employees of Floors and that the only appropriate bargaining unit was one consisting of all Floors' employees in the four cities. (R. 68.)

complaint that it was not an employer of the employees concerned, that it had therefore illegally been made a party to the representation proceeding, and that it had a right to an order enjoining the election (R. 1–8).

On May 24, 1962, the district court issued a temporary restraining order (R. 48–50), which it later extended until June 14, 1962 (R. 51). On June 12, 1962, after a hearing, the district court permanently enjoined the Regional Director from conducting an election pursuant to the Board's Decision (R. 52–59). The district court held that it had jurisdiction upon the authority of *Leedom* v. *Kyne*, 358 U.S. 184. On the merits, the district court held that the Board's findings showed as a matter of law that Greyhound was not a joint employer of the employees, and that "the Board is prohibited by the provisions of the National Labor Relations Act, as amended, from conducting a representation election wherein the plaintiff is a party-employer with regard to persons who, under the Act, are not its employees" (R. 53).

The Court of Appeals for the Fifth Circuit affirmed on the opinion of the district court (R. 71) and this Court granted certiorari (R. 73).[24]

SUMMARY OF ARGUMENT

In enacting the Wagner Act, Congress did not make any provision for direct judicial review of Board de-

[24] A case similar to this one has recently been decided by the District Court for the Eastern District of Michigan. *City Cab Co.* v. *Roumell*, 53 LRRM 2580, decided June 20, 1963. After careful consideration, the court held that it did not have jurisdiction.

cisions in certification proceedings. Instead, Congress provided in Section 9(d) for judicial review only when the result of a certification proceeding forms the basis of a final unfair labor practice order. Congress' clearly manifested purpose was to prevent employers from delaying representation elections by obtaining immediate judicial review of Board decisions directing elections. Greyhound in this case seeks exactly what Congress precluded, and the district court therefore had no jurisdiction.

Leedom v. *Kyne*, 358 U.S. 184, which created a "limited exception" to Congress' withdrawal of jurisdiction to review certification proceedings, does not support the district court's assertion of jurisdiction. *Kyne* was a suit by a union, which had been certified as bargaining agent, to protect the explicit statutory right of a class of employees to a particular type of bargaining unit. This Court held that Congress did not mean to withdraw jurisdiction in those circumstances. *Kyne* was different from the present case for at least three separate reasons: (1) *Kyne* was a suit brought after election and certification; (2) *Kyne* was a suit brought by a union rather than an employer; (3) the Board in *Kyne* had clearly violated a specific remedial statutory provision.

ARGUMENT

Introduction

Before setting out the reasons for contending that the district court did not have jurisdiction, it may be helpful to describe the statutory context in which the case arises.

Section 9(a) of the National Labor Relations Act (29 U.S.C. Sec. 159(a)) provides that a representative designated or selected by the majority of employees in an appropriate bargaining unit shall be the exclusive bargaining representative of all the employees in the unit. Under Section 8(a)(5) of the Act, it is an unfair labor practice for an employer to refuse to bargain with this representative. Although an employer has an obligation to recognize and to bargain with his employees' representative in the absence of any determination by the National Labor Relations Board designating the representative,[4] Section 9(c) of the Act provides a procedure whereby the Board may "certify" a representative in doubtful cases. The Union sought to use that procedure in this case in order to achieve certification as the representative of employees working at the four Greyhound Florida bus terminals.

Under Section 9(c), a union which alleges that a substantial number of employees wish it to be their representative and that the employer declines to recognize it, may, by filing a petition, commence a certification proceeding before the Board. If, after investigation and hearing, the Board finds that a question of representation exists, "it shall direct an election by secret ballot and shall certify the results thereof." The unit in which the election is to take place is the unit the Board determines to be appropriate "in order to assure to employees the fullest freedom in exercising the rights guaranteed by this

[4] *E.g., National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862 (C.A. 2).

Act."[1] The Board, in this case, after petition, investigation and hearing, directed an election in a unit consisting of all porters, janitors and maids working at Greyhound's four Florida bus terminals. The district court has reviewed and enjoined that direction of election and the question here is whether the district court had jurisdiction to do so.

There is no provision of the Act conferring district court jurisdiction. On the contrary, the review provisions of the Act (Sections 10 (e) and (f)) provide for review of only "final order[s]" of the Board, and such review is to take place in a court of appeals. In *American Federation of Labor* v. *National Labor Relations Board*, 308 U.S. 401, this Court held that "final order[s]" include only orders entered by the Board in unfair labor practice proceedings (for example, in proceedings against an employer for refusing to bargain under Section 8(a)(5)), and do not include Board decisions in certification proceedings under Section 9(c). Thus it was made clear that a Board decision directing an election would not be directly reviewable in a court of appeals. The Court in the *American Federation of Labor* case, however, expressly left open the question whether, despite the absence of a provision for review of certification decisions, some Board decisions in certification proceedings might nevertheless be directly reviewed by independent suits in the district courts. 308 U.S. at 412. The question was again left open in *Inland Empire Council* v. *Millis*, 325 U.S. 697, 700.

[1] Under Section 9(b), "the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

Thereafter, in *Leedom* v. *Kyne*, 358 U.S. 184, the Court held that such jurisdiction did, in fact, exist in some circumstances. Respondent's argument is that this case comes within the rationale of the *Kyne* decision.

One other provision of the Act is extremely important in the present case. Although the Act provides that certification decisions are not *directly* reviewable in the courts of appeals as "final order[s]," Section 9(d) expressly provides an indirect route toward full judicial review in a case like this one. Section 9(d) states that, when a "final order" in an unfair labor practice proceeding is based upon a certification proceeding, "such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed" with the court of appeals reviewing the unfair labor practice order under Section 10. In reviewing a final order in an unfair labor practice proceeding, the court of appeals therefore will review the validity of any certification which underlies the unfair labor practice charge.*

Suppose, for example, that a union certification is deemed by an employer to be contrary to a provision of the Act. (The employer contends, for example, that the election was held in an inappropriate bargaining unit.) The employer thereupon refuses to bargain with the union. Should the Board hold that, because of the union's certification, the employer is

---

* *E.g.*, *May Department Stores Co.* v. *NLRB*, 326 U.S. 376; *National Labor Relations Board* v. *Pittsburgh Plate Glass Co.*, 270 F. 2d 167 (C.A. 4), certiorari denied, 361 U.S. 943.

committing an unfair labor practice by refusing to bargain with it, any error in the certification becomes a defense to a proceeding by the Board to enforce its order in a court of appeals. And should an employer contend that it is not the employer of certain employees, as Greyhound argues in this case, it also may plainly obtain judicial review of that issue in a court of appeals should the Board seek to compel the employer to bargain with a union certified to represent those employees.' Section 9(d) thus provides a means by which employers may obtain full judicial review of Board certification decisions without invoking the jurisdiction of a district court.

I

CONGRESS DELIBERATELY PRECLUDED SUITS BY EMPLOYERS TO ENJOIN REPRESENTATION ELECTIONS

The history of the National Labor Relations Act shows clearly that Congress' omission of a provision for direct judicial review of certification decisions was deliberately intended to preclude employers from using judicial review to prevent Board elections. Congress' determination to prevent direct review was based upon its unsatisfactory experience with prior legislation, which had afforded such review of orders directing elections. The predecessor of the National Labor Relations Act was Public Resolution 44 of June 19, 1934,[2] which created the first National Labor Relations Board to administer Section 7(a)

---

[1] *E.g.*, *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111.

[2] 48 Stat. 1183.

of the National Industrial Recovery Act.[9] In Public Resolution 44 Congress had provided for immediate judicial review of Board orders in certification proceedings.[10] Experience with that Resolution showed that employers would quickly take advantage of such a broad provision for judicial review to contest orders directing elections and thereby delay the commencement of collective bargaining. Congress found that such review under Public Resolution 44 seriously impaired the legislative purpose. The Senate Report on the Wagner Act described the shortcomings of direct review as follows:

> *Obstacles to elections.*—Under Public Resolution 44, any attempt by the Government to conduct an election of representatives may be contested *ab initio* in the courts, although such election is in realty merely a preliminary determination of fact. This means that the Government can be delayed indefinitely before it takes the first step toward industrial peace. After almost a year not a single case, in which a company has chosen to contest an election order of the

[9] 48 Stat. 198.

[10] The Resolution gave the Board power "to order and conduct an election by a secret ballot of any of the employees of an employer, to determine by what person or persons or organizations they desire to be represented * * * and to select their representatives for the purpose of collective bargaining * * *." The review provision of the Resolution provided that "[a]ny order issued by such board under the authority of this section may, upon application of such board or upon petition of the persons or persons to whom such order is directed, be enforced or reviewed, as the case may be, in the same manner, so far as applicable, as is provided in the case of an order of the Federal Trade Commission under the Federal Trade Commission Act." 48 Stat. 1183, c. 677, § 2.

Board, has reached decision in any circuit court of appeals."[11]

Therefore, when Congress in the Wagner Act deliberately omitted any provision for immediate judi-

---

[11] S. Rep. No. 573, on S. 1958, 74th Cong., 1st Sess., pp. 5–6, in 2 Legislative History of the National Labor Relations Act, 1935 (G.P.O., 1949), p. 2305. The House Report is to the same effect. H. Rep. No. 972 on S. 1958, 74th Cong., 1st Sess., pp. 5–6, in 2 Legislative History of the National Labor Relations Act, 1935, pp. 2960–2961. See also the testimony of Senator Wagner and Francis Biddle (then Chairman of the National Labor Relations Board) in the Hearings before the Senate Committee on Education and Labor on S. 1958, in 1 Legislative History of the National Labor Relations Act (G.P.O., 1949), 1935, pp. 1425–1426; 1473–1474.

Senator Wagner:

"A second stumbling block in the pathway of the Board has to do with the holding of elections. Under Public Resolution 44, passed last June, any attempt of the Board to hold an election may be contested at the outset in the Federal courts. As a result, the Board, during the last half year, has been able to conduct elections in only 2 cases out of 8. In every case where the company has refused consent to an election, the Board has been tied up so indefinitely that not a single controversy has yet been argued in any circuit court of appeals. * * *"

Chairman Biddle:

"A special feature of the enforcement problem which again sharply illustrates the collapse of existing machinery is the matter of elections * * *.

"Although Joint Resolution 44, to which I have referred, attempted to secure to the Board an effective power to order and conduct elections by permitting a subpena of pay rolls, the resolution in this respect has been wholly nullified. Many elections (191 from October to March) have been held by the regional boards by consent; but in every case where the employer has not consented to the holding of the election and the national Board has been compelled to use its power to order an election the employer has succeeded in tying up the

cial review of Board decisions in certification proceedings, Congress "intended to make it clear that when the Board orders an election, persons affected by that order cannot come into court until after the election has been held * * *."[12] To afford an alternative route of judicial review which would, in the words of the House Report, furnish "an exclusive, complete, and adequate remedy"[13] without delaying bargaining, Congress provided in Section 9(d) of the Act that the correctness of a Board certification de-

---

enforcement of the order almost indefinitely in the courts. In six cases the Board has ordered an election over the objection of the employer and in all six cases the employer has filed a petition with the circuit court of appeals to review the Board's order in accordance with the provision of resolution 44 * * *. Of the 6 cases the Board's decision in 2 was issued in November 1934, in 1, in December 1934, and in 3, in January 1935. In no one of these cases has the matter even come before the court for argument."

See also the debate in the Senate, 79 Cong. Rec. 7658.

[12] Memorandum comparing S. 1958, 74th Cong., 1st Sess., with S. 2926, 73d Cong., in 1 Legislative History of the NLRA, 1935, p. 1323.

[13] H. Rep. No. 972 on S. 1958, 74th Cong., 1st Sess., p. 20, in 2 Legislative History of the NLRA, 1935, p. 2977. The whole relevant passage in the Report reads as follows:

"* * * Section 9(d) of the bill makes clear that there is to be no court review prior to the holding of the election, and provides an exclusive, complete, and adequate remedy whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an election or other investigation pursuant to section 9(c). The hearing required to be held in any such investigation provides an appropriate safeguard and opportunity to be heard. Since the certification and the record of the investigation are required to be included in the transcript of the entire record filed pursuant to section 10(e) or (f), the Board's actions and determi-

cision might be challenged when that decision later forms the basis of an unfair labor practice charge. Section 9(d) was written to provide "for review in the courts only after the election has been held and the Board has ordered the employer to do something predicated upon the results of the election."[14] Where Section 9(d) afforded ultimate review of certification decisions, the clearly manifested legislative purpose was thus to prevent employers from delaying elections through immediate judicial review of decisions directing elections.

---

nations of fact and law in regard thereto will be subject to the same court review as is provided for its other determinations under sections 10(b) and 10(c)."

See also S. Rep. No. 573, 74th Cong., 1st Sess., p. 14, in 2 Legislative History of the NLRA, 1935, p. 2314:

"Section 9(d) makes it absolutely clear that there shall be no right to court review anterior to the holding of an election. An election is the mere determination of a preliminary fact, and in itself has no substantial effect upon the rights of either employers or employees. There is no more reason for court review prior to an election than for court review prior to a hearing. But if subsequently the Board makes an order predicated upon the election, such as an order to bargain collectively with elected representatives, then the entire election procedure becomes part of the record upon which the order of the Board is based, and is fully reviewable by any aggrieved party in the Federal courts in the manner provided in section 10. And this review would include within its scope the action of the Board in determining the appropriate unit for purposes of the election. This provides a complete guarantee against arbitrary action by the Board."

See also, explaining the intended effect of Section 9(d), Memorandum, *supra*, p. 13, n. 12, 1 Legislative History of the NLRA, 1935, p. 1357.

[14] 79 Cong. Rec. 7658.

In 1947, when the Taft-Hartley Amendments to the National Labor Relations Act were under consideration, Congress was asked to modify its general withdrawal of jurisdiction and to permit any interested person to obtain review immediately after a certification of collective bargaining representatives. (The proposed amendment would not have permitted pre-election review, as in this case.) In considering the amendment, Congress knew that under the existing Act an employer could obtain review only when "the employer committed an unfair labor practice, no matter how much in good faith he doubted the validity of the certification."[15] Although the amendment was passed by the House, it was eliminated in conference[16] because, as Senator Taft explained, "such provision would permit dilatory tactics in representation proceedings."[17]

There is therefore no doubt that Congress' failure to provide for direct review of certification decisions was not accidental but reflected a deliberate legislative policy to exclude employers from obtaining immediate judicial review of Board decisions directing elections. Greyhound in this case seeks exactly what

[15] H. Rep. No. 245, 80th Cong., 1st Sess., p. 43, in 1 Legislative History of the Labor Management Relations Act, 1947 (G.P.O., 1948), p. 334.

[16] H. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 56–57, in 1 Leg. Hist. of the LMRA, 1947, pp. 560–561.

[17] 93 Cong. Rec. 6444; 2 Leg. Hist. of the LMRA, 1947, p. 1542. See also H. Rep. No. 245, 80th Cong., 1st Sess. (Minority Report), in 1 Leg. Hist. of the LMRA, 1947, p. 385.

Congress meant to prevent, and the district court therefore did not have jurisdiction.[17a]

II

Leedom v. Kyne Does Not Support Jurisdiction in This Case

Greyhound contends that this Court's decision in *Leedom* v. *Kyne*, 358 U.S. 184, must nevertheless be interpreted to permit the instant suit.

In *Leedom* v. *Kyne*, the Board, after an election, certified the successful union as representative in a bargaining unit consisting of 233 professional and 9 non-professional employees. Prior to the representation election the Board had taken no vote of the professional employees to determine whether a majority of them wished to be included in a unit with non-professional employees. This was directly in violation of Section 9(b) of the Act providing that "the Board shall not (1) decide that any unit is appropriate * * * if such unit includes both professional employees and employees who are not professional unless a majority of such professional employees vote for inclusion in such unit." The union thereupon brought suit in a district court to set aside the certification. This Court held that the Board's action was plainly "in excess of [the Board's] delegated powers and contrary to a specific prohibition in the Act." 358 U.S. at 188, 189. In these circumstances, the Court held that the district court had jurisdiction of a suit

---

[17a] The enactment of the Administrative Procedure Act, 5 U.S.C. 1001, *et seq.*, did not confer jurisdiction where Congress had previously excluded it. *Operating Engineers, Local No. 148* v. *Operating Engineers, Local No. 2*, 173 F. 2d 557, 559 (C.A. 8); *Kirkland* v. *Atlantic Coast Line R. Co.*, 167 F. 2d 529 (C.A. D.C.)

brought by the union to set aside the certification because " 'absence of jurisdiction of the federal courts' would mean 'a sacrifice or obliteration of a right which Congress' has given professional employees * * *. This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." 358 U.S. at 190.

The Court has just emphasized that *Leedom* v. *Kyne* fashioned only a "limited exception" to Congress' general preclusion of district court jurisdiction. *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, 16. The Court also carefully warned in *Sociedad* that its decision there was "not to be taken as an enlargement of the exception in *Kyne*." *Id.* at 17. The requirements for jurisdiction under *Kyne* have been found to be stringent by the courts of appeals: of the fourteen cases[18] discussing the applicability of *Kyne* to suits

[18] *National Biscuit Division* v. *Leedom*, 265 F. 2d 101 (C.A. D.C. 1959); *Leedom* v. *Norwich, Connecticut Printing Union*, 275 F. 2d 628 (C.A. D.C. 1960); *International Ass'n of Tool Craftsmen* v. *Leedom*, 276 F. 2d 514 (C.A. D.C. 1960); *Leedom* v. *International Brotherhood of Electrical Workers*, 278 F. 2d 237 (C.A. D.C. 1960); *Atlas Life Ins. Co.* v. *Leedom*, 284 F. 2d 231 (C.A. D.C. 1960); *Department & Specialty Store Employees' Union* v. *Brown*, 284 F. 2d 619 (C.A. 9 1961); *Local 1545, United Brotherhood of Carpenters and Joiners* v. *Vincent*, 286 F. 2d 127 (C.A. 2 1960); *Navajo Tribe* v. *National Labor Relations Board*, 288 F. 2d 162 (C.A. D.C. 1961); *McLeod* v. *Local 476, United Brotherhood of Indus. Workers*, 288 F. 2d 198 (C.A. 2 1961); *Boyles Galvanizing Co.* v. *Waers*, 291 F. 2d 791 (C.A. 10 1961); *Empresa Hondurena de Vapores, S.A.* v. *McLeod*, 300 F. 2d 222 (C.A. 2 1962); *Consolidated Edison Co.* v. *McLeod*, 302 F. 2d 354 (C.A. 2 1962); *Milk and Ice Cream Drivers Union* v. *McCulloch*, 306 F. 2d 763 (C.A. D.C. 1962); *Miami Newspaper Pressmen's Union* v. *McCulloch*, No. 17,459

brought under the Act, in only three unusual cases has the court held that a district court had jurisdiction. One of these cases [19] had exceptional international implications justifying the inference that Congress would have intended an assumption of jurisdiction.[20] A second was a suit by an Indian tribe claiming exemption from the Act, in which jurisdiction was not disputed by the parties and the Board was upheld as being plainly correct on the merits.[21] The third, decided on July 18, 1963, was an unusual suit to enforce certification proceedings, rather than to set them aside, as in this case. A union sued to compel the Board to certify the results of an election which the union had won.[22] The court

---

(C.A. D.C.), July 18, 1963, 53 LRRM 2786. See also *Eastern Greyhound Lines* v. *Fusco*, 310 F. 2d 632 (C.A. 6 1962); *Cox* v. *McCulloch*, 315 F. 2d 48 (C.A. D.C. 1963).

Under the Railway Labor Act, where this Court held in *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, that district courts had no jurisdiction to review certification proceedings, the three court of appeals decisions discussing the applicability of *Kyne* have all held that district court jurisdiction did not exist: *UNA Chapter* v. *National Mediation Board*, 294 F. 2d 905 (C.A. D.C. 1961); *Air Line Stewards and Stewardesses Assoc.* v. *National Mediation Board*, 294 F. 2d 910 (C.A. D.C. 1961); *WES Chapter* v. *National Mediation Board*, 314 F. 2d 234 (C.A. D.C. 1962).

[19] *Empresa Hondurena de Vapores* v. *McLeod, S.A.*, 300 F. 2d 222 (C.A. 2), judgment vacated, 372 U.S. 10 (see *infra*, pp. 27–28). Strictly, the court did not say that *Kyne* applied, but created an additional exception to the withdrawal of jurisdiction because of the extraordinary circumstances of the case.

[20] See *infra*, p. 22.

[21] *Navajo Tribe* v. *National Labor Relations Board*, 288 F. 2d 162 (C.A. D.C.).

[22] *Miami Newspaper Pressmen's Union* v. *McCulloch*, No. 17,459 (C.A. D.C.), July 18, 1963, 53 LRRM 2786.

held that, in the circumstances, the Act imposed a "mandatory duty" on the Board to certify the union and that district court jurisdiction existed to enforce that duty.

Leedom v. *Kyne* therefore did not generally reverse Congress' withdrawal of direct jurisdiction to review certification decisions. Rather, *Kyne* created a narrow exception applicable only to cases sufficiently different from those confronting Congress when it enacted the Wagner Act—and sufficiently urgent—to permit the conclusion that Congress did not intend to exclude direct review. The present case is not in any regard an unusual case calling for the exceptional remedy of immediate review. It is, on the contrary, an example of exactly what Congress had in mind when it acted to withdraw jurisdiction. Specifically, *Kyne* contained three elements supporting the existence of jurisdiction which are missing here: (1) *Kyne* was a suit brought after election and certification of a bargaining agent, when administrative remedies had been exhausted. This is a suit to prevent an election and is premature even if review would otherwise be appropriate. (2) *Kyne* was a suit by a union, which had no adequate remedy under Section 9(d) for the alleged violation. This is a suit by an employer which has an adequate remedy under Section 9(d). (3) The Board in *Kyne* had acted in plain violation of a specific, explicit, remedial provision of the Act. The Board in this case has at worst made an error of fact which should only be reviewed on the Board record in a court of appeals.

For these three reasons, *Kyne* does not justify the conclusion that there is jurisdiction here.

A. THIS IS A SUIT TO PREVENT AN ELECTION

Unlike the plaintiff in *Kyne*, which waited until administrative remedies had been exhausted, the respondent in this case seeks judicial review *before* an election has taken place, in an attempt to prevent the election. The legislative history of the Wagner Act literally could not be plainer in showing Congress' purpose to prohibit such *pre*-election judicial review. Both the Senate and House Reports are absolutely explicit:

Senate:

> *Section 9(d) makes it absolutely clear that there shall be no right to court review anterior to the holding of an election.* An election is the mere determination of a preliminary fact, and in itself has no substantial effect upon the rights of either employers or employees. There is no more reason for court review prior to an election than for court review prior to a hearing. * * * [22]

House:

> As previously stated in this report, the efficacy of Public Resolution 44 has been substantially impaired by the provision for court review of election orders prior to the holding of the election. Section 9(d) of the bill *makes clear that there is to be no court review prior to the holding of the election,* and provides an exclusive, complete, and adequate remedy whenever an

[22] S. Rep. No. 573 on S. 1958, 74th Cong., 1st Sess., p. 14, 2 Leg. Hist. of the NLRA, 1935, p. 2314 (emphasis added).

> order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an election or other investigation pursuant to section 9(c).[24]

Senator Wagner explained to the Senate Labor Committee that the "present bill cures this difficulty [of employers indefinitely delaying elections through judicial review] *by providing that the Board may conduct elections without anterior court review.*"[25] Francis Biddle (then Chairman of the National Labor Relations Board) stated to the same Committee that the "bill allows the Board to order the election without provision for review of the election order. * * * *Obviously an employer should not be allowed to hold up an election.*"[26] A Senate Committee memorandum explaining the differences between Public Resolution 44 and the Wagner Act pointed out:

> Section 9(d) is a new provision intended to *make it clear that when the Board orders an election, persons affected by that order cannot come into court until after the election has been held* and the Board directs that the employer take some action based upon the results of that election. * * *[27]

Greyhound's premature suit before election also violates the general principle compelling exhaustion of administrative remedies before resort is had to judi-

---

[24] H. Rep. No. 972 on S. 1958, 74th Cong., 1st Sess., p. 20, 2 Leg. Hist. of the NLRA, 1935, p. 2977 (emphasis added).

[25] Hearings before the Senate Committee on Education and Labor on S. 1958, 1 Leg. Hist. of the NLRA, 1935, pp. 1425–1426 (emphasis added).

[26] *Id.* at 1474 (emphasis added).

[27] 1 Leg. Hist. of the NLRA, 1935, p. 1323 (emphasis added).

cial review, for Greyhound's dispute with the Board will become moot should the Union lose the election which the Board has directed. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–52; *Whitehouse* v. *Illinois Central R.R. Co.*, 349 U.S. 366, 373–374; *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 767–768.

Strict prohibition of review sought before an election is also well justified by practical considerations. Pre-election review necessarily delays expression of the employees' desire regarding representation. This delay easily leads to unjustified attrition of a union's strength which may, in turn, encourage the union to strike to achieve recognition denied it through the orderly certification procedure. Prompt expression of the employees wishes may forestall a strike and encourage bargaining. Congress in 1935 recognized this danger of industrial warfare as a reason for precluding pre-election review:[28]

> * * * The ability of employers to block elections has been productive of a large measure of industrial strife. When an employee organization has built up its membership to a point where it is entitled to be recognized as the representative of the employees for collective bargaining, and the employer refuses to accord such recognition, the union, unless an election can promptly be held to determine the choice of representation, runs the risk of impairment of strength by attrition and delay while the case is dragging on through the

[28] H. Rep. No. 972 on S. 1958, 74th Cong., 1st Sess., pp. 5–6, 2 Leg. Hist. of the NLRA, 1935, pp. 2960–2961.

> courts, or else is forced to call a strike to achieve recognition by its own economic power. Such strikes have been called when election orders of the National Labor Relations Board have been held up by court review.

In *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, this Court permitted a pre-election injunction of a Board representation election to be obtained by a union. *Sociedad* was an extraordinary case of international character in which, with regard to jurisdiction, the Court said (372 U.S. at 16–17):

> * * * the overriding consideration is that the Board's assertion of power to determine the representation of foreign seamen aboard vessels under foreign flags has aroused vigorous protests from foreign governments and created international problems for our Government. * * * [T]he presence of public questions particularly high in the scale of our national interest because of their international complexion is a uniquely compelling justification for prompt judicial resolution of the controversy over the Board's power.

There is nothing remotely comparable here.

B. THIS IS A SUIT BY AN EMPLOYER WITH AN ADEQUATE JUDICIAL REMEDY UNDER SECTION 9(d) OF THE ACT

The plaintiff in *Leedom* v. *Kyne* was a union which had no remedy except a suit in the district court for protecting the right which the Board had violated in the certification proceedings. The absence of another remedy was a principal reason for the Court's decision in *Kyne*. The employer in this case, however, has an adequate statutory remedy in the court of appeals

should the Board election result in an unlawful certification. Nothing in *Kyne* should permit an employer to circumvent the statutory procedure for review of certification proceedings by an independent equity suit in a district court. Cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41.

The union in *Kyne* had been unlawfully certified to represent a unit containing some non-professional workers in addition to professional employees. To protect the professional employees' right to an exclusive unit, the union might have refused to bargain on behalf of the non-professionals. If all parties concerned acquiesced in this, the professional employees would have suffered no harm from the Board's error—although the non-professionals would have been unrepresented. Also, theoretically, the union's refusal to bargain for the non-professionals in *Kyne* might have given rise to an unfair labor practice charge against the union under Section 8(b)(3) of the Act, which might have enabled the union to obtain judicial review of the Board's unit determination.

However, it was also quite possible in *Kyne* that the employer would refuse to bargain with the union except in the unit which had been certified by the Board. In that situation, unless there were district court jurisdiction to set aside the certification, the union would be helpless to protect the right which the Board had violated. The union would be forced either to bargain as the employer wished—in an improper unit—or not to bargain at all. Neither the union nor the employees could precipitate an unfair labor practice proceeding against the employer for re-

fusing to bargain with a union representing solely the professionals, when a different unit had been certified by the Board. The General Counsel of the Board could hardly be expected to issue a complaint against an employer for refusing to bargain except in the unit just certified. A decision by the General Counsel not to bring charges would not be judicially reviewable. *E.g., Retail Store Employees Local 954* v. *Rothman,* 298 F. 2d 330 (C.A. D.C.). It is, moreover, probably an unfair labor practice for a union to insist that an employer bargain in a unit different from the one the Board has certified. *Douds* v. *International Longshoremen's Ass'n,* 241 F. 2d 278 (C.A. 2).

The Court in *Kyne* could therefore say that in the absence of district court jurisdiction "there is no other means, within their [the employees] control * * * to protect and enforce that right." 358 U.S. 190.[22] On the other hand, an *employer* who as-

[22] The inadequacy of the union's remedy was also recognized by the court of appeals in *Kyne* (249 F. 2d 490, 492):
"Here review by way of § 10 is too remote and conjectural to be viewed as providing an adequate remedy * * *. Since the employer is not aggrieved by the Board's inclusion of the nine non-professionals, he cannot be relied upon to refuse to bargain and thus make it possible for the Association to bring a reviewable § 10 proceeding. Nor is it likely that an Engineers Association refusal to bargain for the nine non-professionals would induce the employer to seek review since he would then be free to deal with all employees individually. Nor could we expect such refusal to induce any of the nine non-professionals to seek review. They are hardly likely to insist upon placing their fate in the hands of a reluctant bargaining representative."

There is even less of a possibility for a labor organization which *loses* a representation election to be able to obtain judicial review of certification decisions under the statutory procedure.

serts that he has no duty to bargain with a certified union can fully protect himself without recourse to the district court. The employer may simply refuse to bargain with the union. Should that cause an unfair labor practice charge to be brought, as is likely, Section 9(d) affords full judicial review of the certification in the court of appeals before the employer is compelled to bargain. In view of Congress' express purpose to make Section 9(d) review an exclusive remedy,[**] there is no reason for invoking the jurisdiction of the district courts on behalf of parties for whom Section 9(d) provides adequate judicial relief.[*]

[**] See *supra*, pp. 13–15.

[*] Two cases in the courts of appeals have held for this reason that *Kyne* can never apply to suits by employers. *Leedom* v. *International Brotherhood of Electrical Workers*, 278 F. 2d 237 (C.A. D.C.); *Atlas Life Ins. Co.* v. *Leedom*, 284 F. 2d 231 (C.A. D.C.). See also *Miami Newspaper Pressmen's Union* v. *McCulloch*, No. 17,459 (C.A. D.C.), July 18, 1963, n. 7, 53 LRRM 2786, 2789.

There is no basis for the district court's conclusion that the statutory review procedure afforded Greyhound by Section 9(d) is an inadequate remedy (1) because it is contingent upon the Union filing an unfair labor practice charge should Greyhound refuse to bargain with it, and (2) because it is more likely that, in the event of a refusal to bargain, the Union would instead "resort to the use of the powerful weapon of picketing" (R. 56). Should the Union be certified as the representative and Greyhound refuse to bargain with it, the Board's experience has shown that it is almost a certainty that a refusal to bargain charge will be filed, rather than that the Union will turn immediately to economic pressure. There is no basis in the record of this case for speculating that the Union here would picket rather than file a charge. Moreover, there is no reason to believe that district court review reduces rather than increases the danger of a strike or picketing by the Union. Despite a district court injunction, the Union and the employ-

Should Greyhound obtain review here, it will in fact have *two* chances to contest the validity of the Board's election order and two chances to delay the commencement of bargaining. For, should the Union obtain certification over Greyhound's objection, Greyhound may refuse to bargain with it and then assert again that it is not an employer as a defense to an unfair labor practice charge. As explained by Senator Wagner, the Act "does not stoop to the folly of holding the Board up twice, once by court review before the election, and then by court review of the order based upon the election."[31]

In *McLeod* v. *Empresa Hondurena de Vapores, S.A.* (decided with *McCulloch* v. *Sociedad Nacional*), 372 U.S. 10, the Court of Appeals for the Second Circuit permitted an employer to seek review of representation proceedings in the district court without waiting for the commencement of an unfair labor practice proceeding against him. 300 F. 2d 222. The court of appeals relied, as did this Court in *Sociedad*, upon the danger of offending a foreign government should the employer be compelled to wait to obtain review

---

ees remain free to resort to a peaceful strike or picketing to vindicate the organizational rights guaranteed by Section 7 of the Act. Indeed, if resolution of the underlying representation question is delayed by district court suits such as the instant one, the likelihood of strikes may be far greater than if the representation proceeding is allowed to run its course and is then reviewed under the statutory procedure. Congress recognized this danger in excluding review under the Act. See H. Rep. No. 972, 74th Cong., 1st Sess., quoted *supra*, pp. 22–23.

[31] Hearings, in 1 Leg. Hist. of the NLRA, 1935, p. 1426. See also H. Rep., No. 245, 80th Cong., 1st Sess. (Minority Report), p. 94, in 1 Leg. Hist. of the LMRA, 1947, p. 385.

under Section 9(d). 300 F. 2d at 229. This Court did not specifically decide the jurisdictional question in that case, but vacated the judgment of the court of appeals in light of the decision in *Sociedad* that a union might enjoin the identical representation proceeding. 372 U.S. at 22. There is, in any case, no similar inadequacy of review through Section 9(d) in the present case.

C. THE BOARD HAS MADE NO PLAIN ERROR OF STATUTORY CONSTRUCTION

Finally, *Leedom* v. *Kyne* is not applicable here because the error attributed to the Board concerns the evaluation of the particular facts of this case. District court jurisdiction was found appropriate in *Kyne*, where no factual dispute was involved, because the Board had made an error of statutory construction. Its order was "plainly" "contrary to a specific prohibition in the Act." 358 U.S. at 188, 189. In construing *Leedom* v. *Kyne*, the courts of appeals have uniformly concluded that it applies only when the Board makes a clear error of general statutory construction—not when there has been an error in evaluating particular facts or where the Board's decision is committed to its discretion.[22]

The alleged error of the Board here was wholly unlike the error in *Kyne*. The Board determined Greyhound to be a joint employer, with Floors, of the porters, janitors and maids working at Greyhound's four Florida terminals. A person is a joint "employer" of

[22] See note 18, *supra*. A separate exception for a Board decision violating constitutional rights was suggested in *Fay* v. *Douds*, 172 F. 2d 720 (C.A. 2).

particular employees within the meaning of Section 2(2) of the Act when he possesses power to control the terms and conditions of their employment.[33] Whether Greyhound, along with Floors, possessed sufficient control of the employees to qualify as a joint employer in this case was thus a so-called mixed question of law and fact involving not the general meaning of the statute but the application of a generally formulated statutory standard to the particular facts of the case. Such a question is to be treated as one of fact.[34] The employees in this case worked on Greyhound's premises, and Greyhound controlled at least some of their working conditions including, to some extent, their hours of work. The Board's conclusion of joint employment was therefore plainly reasonable.[35]

---

[33] See *National Labor Relations Board* v. *Condenser Corp.*, 128 F. 2d 67, 71 (C.A. 3); *National Labor Relations Board* v. *Long Lake Lumber Co.*, 138 F. 2d 363, 364 (C.A. 9); *West Texas Utilities Co.*, 108 NLRB 407, 413–414, enforced, 218 F. 2d 824 (C.A. 5); *Macy's San Francisco and Seligman & Latz*, 120 NLRB 69; *Panther Coal Co.*, 128 NLRB 409; *Spartan Department Stores*, 140 NLRB No. 59. Cf. *Operating Engineers Local Union No. 3* v. *National Labor Relations Board*, 266 F. 2d 905, 909 (C.A. D.C.), certiorari denied, 361 U.S. 834.

[34] See *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504.

[35] The district court seems to have rested its conclusion that Greyhound is not an employer on the premise that Floors is an independent contractor *vis-à-vis* Greyhound and that Greyhound cannot be an employer of employees working for an independent contractor, even though they work at Greyhound's terminals (R. 53). Assuming *arguendo* that Floors is sufficiently independent of Greyhound so that it is not an "employee" or a mere department of Greyhound, that does not mean that Floors could not share control over the workers to an extent which would make Greyhound a co-employer. See cases in footnote 33, *supra*.

Leedom v. *Kyne* has been properly restricted to pure questions of statutory construction, for if it were applied to cases such as this one, involving evaluation of particular facts, the district courts would be compelled to make determinations of fact reserved by the Act to the Board and the courts of appeals. Under the Act, findings of fact are to be made by the Board and are to be reversed in the courts of appeals only when they are not "supported by substantial evidence on the record considered as a whole."[36] Not only did a single district judge, rather than a three-judge court of appeals, review the Board's determination of joint employment here, but the district court's review was not on the record made before the Board and did not observe the substantial evidence test. The district court did not have the Board record before it and it based its determinations in part upon affidavits submitted by Greyhound which were not before the Board.[37] This application of *Kyne* violated Congress' explicit delegation to the Board of authority to make findings of fact in proceedings under the Act, subject only to limited judicial review on the record before the Board.[38]

CONCLUSION

For the foregoing reasons the judgment of the court of appeals should be reversed and the case remanded

[36] Sections 10 (e) and (f) of the Act, 29 U.S.C. 160(e)(f).

[37] R. 58, 42-47.

[38] *See Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474; *National Labor Relations Board* v. *Walton Manufacturing Co.*, 369 U.S. 404.

to the district court with instructions to dismiss the complaint for lack of jurisdiction.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

PAUL BENDER,
Assistant to the Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

HERMAN M. LEVY,
Attorney,
National Labor Relations Board.

AUGUST 1[illegible]3.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

SEC. 2(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

SEC. 2(3). The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time,

or by any other person who is not an employer as herein defined.

* * * * *

SEC. 8(a)(5). It shall be an unfair labor practice for an employer * * * to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

* * * * *

SEC. 8(b)(3). It shall be an unfair labor practice for a labor organization or its agents * * * to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title.

* * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or sub-

division thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; * * *

* * * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(c) or 10(f), * * * and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * * * *

SEC. 10. * * *

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the

court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. * * * Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as pro-

vided in section 2112 of Title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * *

U.S. GOVERNMENT PRINTING OFFICE: 1943